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Atkin, Wright & Miles v. The Mountain States Telephone and Telegraph Company et al : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT

STATE OF UTAH

ATKIN, WRIGHT & MILES,
Chartered, a Utah corporation, :

Plaintiff-Respondent, :

vs. : Case No. 18232

THE MOUNTAIN STATES TELEPHONE :
AND TELEGRAPH COMPANY, et al.,
:
Defendant-Appellant.

APPELLANT'S REPLY BRIEF

Appeal from a Judgment of the District Court, in and for Washington County, State of Utah, The Honorable Robert F. Owens, Circuit Court Judge, pro tem, presiding

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

PUBLIC SERVICE COMMISSION TARIFFS

Page

OTHER AUTHORITIES CITED

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ATKIN, WRIGHT & MILES, Chartered, a Utah corporation,	:	
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STATEMENT OF FACTS

Because Respondent's Brief misstated or distorted the facts in several important particulars, it is necessary for Mountain Bell to respond thereto as follows:

1. While Respondents claim that the only listing error occurred in the yellow page listing for the Allen firm, the fact is that another error was made in the white page listing for the Allen firm, wherein the residence addresses and telephone numbers for the firm members preceded the firm's address and number, contrary to the listing order in prior and subsequent issues of the directory (Ex. 1, p. 94; Tr. 201). Thus, for example, a person seeking the services of Michael Hughes, a member of the Allen firm, might be directed by the

white pages to call his residence, and by the yellow pages to call the Atkin firm's number.

2. The Telalease, which Respondent claims is a contract for a specific telephone number, nowhere contains a provision that specifically grants Respondent a right to the number. A telephone number was inserted merely for identification purposes, together with the firm's name and address, but there was no provision stating that that number was a term of the Telalease. By its terms, the Telalease is simply an equipment lease (Ex. 6, ¶ 1). It specifically incorporates all applicable tariffs, is fully integrated, and provides that Mountain Bell is not bound by any representations not set forth therein (Ex. 6, ¶ 8).

3. The initial decision to place an intercept on the Atkin firm's line was neither arbitrary nor without prior notice. (Tr. 208.) Mountain Bell's General Attorney, Kenneth Madsen, met with representatives of both the Allen firm and the Atkin firm to discuss the problem prior to implementing the intercept, and various alternatives were considered. (Tr. 179-80, 182, 189, 193-94, 199-200, 630-34.) The intercept procedure was chosen in order to direct callers to the law firm they wished to reach, and was the most reasonable approach available under the circumstances. (Tr. 630-34.)

4. The Amended Complaint (R. 81-92) claimed damages resulting only from the mechanical intercept, which was in effect for only thirty-six hours (Tr. 538-39.) Respondent

did not amend its Complaint after the live intercept was implemented to allege damages resulting therefrom. Nevertheless, Respondent was permitted, over objection, to introduce evidence supporting damages that allegedly arose as a result of deficiencies in the operation of the *live* intercept, which was placed some four months after the mechanical intercept was removed. Respondent did not move to amend its Complaint to conform to the evidence, nor did the Court make any such order *sua sponte*.

5. Though Mountain Bell supported an intercept procedure generally, it never endorsed the live operator intercept procedure before the Public Service Commission; rather, *Respondent* insisted on a live operator intercept if the Commission determined that an intercept should be placed, notwithstanding Mountain Bell's warnings concerning the difficulty of operating a live intercept with consistency and accuracy. (Tr. 421-24.)

6. No witness for the Atkin firm stated that he sought advice or legal services from another attorney as a result of the difficulties with the live operator intercept. Nor did any witness testify that he or she lost faith in the Atkin firm because of the difficulties or blamed the Atkin firm therefor.

7. With regard to the Atkin firm's special damages for reprinting stationery, etc., the evidence was that Mountain Bell had offered to pay for such expenses. (Tr. 192, 662-63.)

In any event, however, the jury did not award any amount as and for special damages. (Tr. 782.)

8. The evidence shows no reduction in the Atkin firm's annual revenue during the period the directory with the erroneous listing was in effect. (Tr. 525-29, Ex. 27.) The bulk of evidence of damage was with respect to projected income. (Tr. 522, 529-36.)

ARGUMENT

The Atkin firm argues passionately that the jury verdict should be affirmed because there was substantial evidence to support it. Mountain Bell disputes that there was such evidence. The important point, however, is that no verdict can be sustained where the trial court has committed prejudicial errors of law.

In the present case, the errors of law were numerous, and include: the trial court's failure to rule that Mountain Bell cannot be held liable for actions taken consistent with a filed tariff (see Appellant's Brief, pp. 8-16); its failure to hold that Mountain Bell cannot be held liable for following a specific order of the Public Service Commission (see Appellant's Brief, pp. 16-22); its failure to limit Mountain Bell's liability as a matter of law as a result of applicable tariffs (see Appellant's Brief, pp. 34-36); its jury instructions that a contract existed for a specific telephone number (see Appellant's Brief, pp. 23-25); its failure to include Mountain

Bell's theories of defense adequately in the jury instructions (see Appellant's Brief, pp. 25-30); and its failure to rule or instruct the jury that the placement of the intercept was reasonable, just, fair and equitable, and that the court and jury were bound by the findings of the Public Service Commission (see Appellant's Brief, pp. 30-33).

POINT I

AS A MATTER OF LAW, MOUNTAIN BELL'S ACTIONS WERE REASONABLE, IN THE PUBLIC INTEREST, AND LAWFUL; HENCE THERE IS NO BASIS FOR LIABILITY.

A. The Public Service Commission Order and Findings establish conclusively that Mountain Bell's actions were fair, reasonable, and in the public interest.

In its Brief, Respondent has totally ignored perhaps the most critical fact in this case--that the Public Service Commission (PSC) found, not just as a general proposition, but with respect to the specific facts of this case: (1) that tariff Section 20(N)(1) was valid and applicable and precluded Respondent from asserting any property right to any specific telephone number; and (2) that the intercept and number change procedure, which formed the sole basis for Respondent's Complaint, was "fair", "equitable", "reasonable", and "just". (R. 129-130A.) The PSC order based on those findings was confirmed by this Court when it dissolved the preliminary injunction.

The PSC order resulted from a hearing in which Respondent participated fully, the Commission holding that Respondent had made a general appearance by virtue of its participation. (Ex. 24 at 95-98.) The findings and order were not appealed and became final; hence, they could not be attacked collaterally. Utah Code Ann. § 54-7-14. Nevertheless, the trial court's jury instructions ignored these facts and erroneously permitted the jury to assess damages on findings that were in direct conflict with the PSC order.

Thus, the cases cited by Respondent are distinguishable from the present case. In Muskegon Agency, Inc. v. General Telephone Co., 340 Mich. 472, 65 N.W.2d 748 (1954) and 350 Mich. 41, 85 N.W.2d 170 (1957), for example, a telephone company was held liable, not because it had placed an intercept, but because it had changed plaintiff's telephone number and refused to place an intercept, and further prevented all calls from reaching the plaintiff over the printed telephone number. Furthermore, the Michigan court there held that the case did not involve an error in listings; rather, the error was in negligently assigning plaintiff a number that had already been assigned to another party; no tariff limitation of liability for that kind of action existed at that time. Id. at 750-52. See also Valentine v. Michigan Bell Telephone Co., 388 Mich. 19, 199 N.W.2d 182, 184 (1972). In any event, Muskegon is "contrary to the great weight of authority". Warner v. Southwestern Bell Telephone Co., 428 S.W.2d 596, 602 (Mo. App. 1968), cited with approval by the Michigan court in Valentine, supra, 199 N.W.2d at 184, n.1.

Similarly, in Clayton Home Equipment Co. v. Florida Telephone Corp., 152 So.2d 203 (Fla. App. 1963), the court held that an allegation that the telephone company had "arbitrarily and without just cause" withdrawn plaintiff's telephone number was sufficient to state a claim. In addition, the Court there made no mention of an applicable tariff limitation of liability.

Product Research Associates v. Pacific Telephone & Telegraph Co., 16 Cal. App. 3d 654, 94 Cal. Rptr. 216 (1971), cited by Respondent, is distinguishable on its facts, but more importantly, it has been expressly overruled in Waters v. Pacific Telephone Co., 12 Cal. 3d 1, 523 P.2d 1161, 114 Cal. Rptr. 753 (1974) (see 523 P.2d at 1167, n.10).

In the present case, the finding by the Public Service Commission that Mountain Bell's action in changing the Atkin firm's number was reasonable and just under the circumstances precludes a contrary conclusion.

B. The court erred in instructing the jury that it could find a contract for a telephone number.

The intercept procedure was proper because, as the Public Service Commission found, the Atkin firm had no property right in the telephone number and under the circumstances, Mountain Bell had just cause to change it. That finding disposes of Respondent's argument that it had a right to the number based on negotiations with Mountain Bell's employee, Dennis Wood, and based on the Telalease. Wood did not have the power to enter a contract on behalf of Mountain Bell that was contrary to the tariff. See Utah Code Ann. § 54-3-7 ("[N]o public utility shall...extend to any person any form of contract or agreement...except such as are regularly and uniformly extended to all corporations and persons"). See also Utah Code Ann. § 54-3-8 (prohibiting preferences).

With respect to the argument that the Telalease constituted a contract for a particular number, it is sufficient to note that the Telalease is an equipment lease only and that it contains no provision granting the lessee the right to a specific telephone number. Furthermore, the Telalease is fully integrated and specifically incorporates all applicable tariff provisions (including, therefore, Tariff Section 20(N)(1) denying a right to a particular telephone number). (See Ex. 6, ¶ 8.)

Respondent's reliance on Tariff Section 20(B) and the Private Line Tariff to establish a "contract for a telephone number" is misplaced. Those tariffs refer only to a contract between Mountain Bell and its subscriber for telephone service, not a telephone number. If, as Respondent insists, the relationship between the Telephone Company and its subscribers is characterized as contractual, then the terms of the contract are the tariff provisions, including Section 20(N)(1), which denies the subscriber a right to any particular number. See Waters v. Pacific Telephone Co., 12 Cal. 3d 1, 523 P.2d 1161, 1162, 114 Cal. Rptr. 753 (1974).

C. Mountain Bell did not violate Tariff Section 20(E)(4).

In response to Mountain Bell's argument that its liability is limited by Tariff Section 20(E)(3), Respondent argues that Mountain Bell violated Tariff Section 20(E)(4) by inserting itself into a controversy between customers. That argument is patently absurd. In the first place, that section of the tariff typically applies where a business splits up and more than one faction asserts the right to retain use of a published telephone number, which was not the case here. More importantly, this action was not a controversy between customers; rather, it was a controversy between the Allen firm (whose number had been incorrectly printed and which vehemently protested to Mountain Bell and threatened suit against Mountain Bell), and Mountain Bell (which had committed the error). The Atkin firm was necessarily drawn into the controversy because its number was the one printed for the Allen firm. The resolution of the problem necessarily required action by Mountain Bell; hence, it could not avoid being a party to the controversy.

In summary, the findings of the Public Service Commission that the Atkin firm had no property right in the telephone number and that Mountain Bell was justified in putting into operation the intercept and number change procedure established that Mountain Bell's actions were reasonable and lawful; therefore, as a matter of law Mountain Bell is not liable for such actions.

POINT II

TARIFF LIMITATIONS OF LIABILITY LIMIT MOUNTAIN BELL'S LIABILITY FOR ALLEGED DEFICIENCIES IN PROVISION OF TELEPHONE SERVICE, INCLUDING THE OPERATION OF THE INTERCEPTS.

A. Mountain Bell's liability for directory errors and service interruptions or malfunctions is limited by tariff.

Respondent's argument that the Public Service Commission does not have jurisdiction over the furnishing of paid advertising in the yellow pages, while correct, misses the point on several scores. First, the error in the yellow pages (the listing of Atkin's number for the Allen firm) was an error in the initial yellow page listing of the Allen firm, which, under the categorization of 74 Am. Jur. 2d Telecommunications § 32, is a "type 1" error, over which the Commission does have jurisdiction, under the authority of Allen v. General Telephone Co., 20 Wash. App. 144, 578 P.2d 1333 (1978), and other cases cited in Appellant's Brief (pp. 34-36). The fact that the error was printed in bold type is of no consequence because the Atkin firm's number should not have been printed at all in the Allen firm's initial listing. Therefore, the tariff limitation of liability (Section 20(E)(3)) applies. See Allen, supra, which applied a similar tariff limitation where the plaintiff's initial yellow page listing was omitted, even though plaintiff had contracted for that listing to be in bold print.

Respondent acknowledges that such a limitation would apply to the Allen firm (see Respondent's Brief, pp. 22-23), but in a classic example of a double standard, asserts that the limitation should not apply to it. However, the language of the limitation does not limit Mountain Bell's liability only as to those customers in whose listings an error appears. It states:

> The Telephone Company's liability arising from errors in or omissions of directory listings shall be limited to and satisfied by a refund not exceeding the amount of the charges for such of the customer's service as is affected during the period covered by the directory in which the error or omission occurs.

The Mountain States Telephone and Telegraph Company General Exchange Tariff § 20(E)(3).

Thus the limitation applies to any customer whose service is affected by a listing error.

There is a second respect in which Respondent's argument that the Commission has no jurisdiction over yellow page advertising misses the point. Respondent's action for damages does not arise directly out of the error in the Allen firm's listing; rather, it arises out of the change in its telephone service which was implemented to correct the listing error. More specifically, the bulk of Respondent's claimed damage allegedly arose out of deficiencies in the operation of the intercepts.

It may be argued that even the alleged deficiencies with the Respondent's service arose out of the listing error, since it was the listing error that necessitated the intercepts. A similar situation was presented in <u>Warner v. Southwestern Bell Telephone Co.</u>, 428 S.W.2d 596 (Mo. App. 1968).

In that case, plaintiff's listing appeared in the wrong geographical section of the directory for two consecutive years. As a result, operators told long distance callers trying to obtain plaintiff's number from the directory assistance service that no such business was listed in the town where plaintiff was located. Plaintiff argued that the tariff limitation of liability relating to directory errors was inapplicable because the "mislisting" was not merely in the directories but was continued at the toll centers for the long distance and information operators. Notwithstanding the fact that plaintiff's claimed damages arose from failure of the operators to give correct information to callers, the court applied the tariff limitation of liability relating to directory errors, stating that the "whole difficulty arose out of the errors in the directories". Id. at 600. See also Garrison v. Pacific Northwest Bell Telephone Co., 45 Ore. App. 523, 608 P.2d 1206, 1211 (1980), in which the court observed:

> Rates, service levels, and the remedy for erroneous listings or service failures are inseparable.

The provision of telephone service is undoubtedly within the Public Service Commission's jurisdiction, and Respondent does not suggest otherwise. Telephone service is provided pursuant and subject to the tariffs filed with the Public Service Commission. One such tariff which specifically limits Mountain Bell's liability for errors in the furnishing of telephone service is Section 20(G)(5), which provides:

> Apart from the credit allowance stated above, [which simply gives the customer proportionate credit against local service charges for the period of time the service is not functioning, provided notice has been given to the Telephone Company], no liability shall attach to the Telephone Company for damages arising from errors, mistakes, omissions, interruptions, or delays of the Telephone Company, its agents, servants, or employees, in the course of establishing, furnishing, rearranging, moving, terminating, or changing the service or facilities (including the obtaining or furnishing of information in respect thereof or with respect to subscribers or users of the service or facilities), in the absence of gross negligence or willful misconduct.

Such a tariff is valid and applies to limit Mountain Bell's liability for the alleged deficiencies in operation of the intercepts. See, e.g., Waters v. Pacific Telephone Co., 12 Cal. 3d 1, 523 P.2d 1161, 114 Cal. Rptr. 753 (1974), and other cases cited in Appellant's Brief, pp. 34-35.

The policy behind such limitations of liability is aptly expressed in Cole v. Pacific Telephone & Telegraph Co., 112 Cal. App. 2d 416, 246 P.2d 686, 688 (1952):

> The theory underlying these decisions is that a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges shall likewise be regulated and limited as to its liabilities. In consideration of its being peculiarly the subject of state control, 'its liability is and should be defined and limited' . . . There is nothing harsh or inequitable in upholding such a limitation of liability when it is thus considered that the rates as fixed by the Commission are established with the rule of limitation in mind. Reasonable rates are in part dependent upon such a rule.

(Citations omitted.)

The very existence of such a tariff provision is an acknowledgement that the telephone company cannot guarantee that its service will always operate perfectly. See Hamilton Employment Service v. New York Telephone Co., 253 N.Y. 468, 171 N.E. 710 (1930). When Respondent did not receive perfect service, therefore, it became subject to the limitation of liability which was designed for just such an occurrence.

B. Mountain Bell's actions did not constitute gross negligence or willful misconduct.

Respondent seeks to avoid the application of the tariff limitation of liability by arguing that the exception relating to "gross negligence or willful misconduct" applies in this case. The Public Service Commission's findings that the number change and intercept procedure were "fair" and "reasonable" are sufficient response to Respondent's argument. Further, the circumstances of the case support the reasonableness of Mountain Bell's actions. Mountain Bell did not derive, nor could it expect to derive, any special benefit from placing an intercept on Respondent's line. On the contrary, Mountain Bell was put to considerable trouble and expense to place the intercept. The only reason it did so was to serve the public interest, so that members of the public who called the number listed for both the Allen firm and the Atkin firm could be directed to the appropriate firm. There was no other realistic solution to the problem created by the listing error. Furthermore, not to have placed the intercept might have led to claims by the Allen firm of discrimination, inadequate service, gross negligence and willful misconduct, to say nothing of the possibility of a contempt citation by the Public Service Commission. Mountain Bell followed the law which requires a public utility to follow orders, rules and regulations of the Public Service Commission. Utah Code Ann. § 54-3-23. For these reasons, it was error for the trial court to instruct the jury that it could find that Mountain Bell was guilty of gross negligence or willful misconduct (which the trial court erroneously equated; see Instruction 5-G, R. 320).

The cases cited by Respondent on the issue of tariff limitation of liability for service problems are instructive and support Mountain Bell's position. In Pilot Industries v. Southern Bell Telephone & Telegraph Co., 495 F. Supp. 356 (D.S.C. 1979), plaintiff sued the telephone company for damages, consisting of lost business, allegedly resulting from interruptions in telephone service as well as errors in directory listings. The evidence was that despite numerous complaints to the telephone company, plaintiff had experienced trouble with its lines affecting incoming WATS calls for a period of 41 days. Southern Bell asserted that a tariff, very similar to Section 20(G)(5), limited its liability. Applying the tariff, the court held that under the facts of that case, there was no evidence of gross negligence or willful misconduct sufficient to avoid the tariff limitation.

The Court in Pilot Industries quoted from Rogers v. Florence Printing Co., 233 S.C. 567, 106 S.E. 2d 258 (1958) regarding the proper test for determining whether an act can be characterized as reckless, willful, or wanton, stating that the determination is made by ascertaining whether the act complained of

> has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights. . . It is this present consciousness of wrongdoing that justifies the assessment of punitive damages. . .; and it has been variously referred to as 'conscious failure to observe due care;'. . . 'conscious indifference to the rights of others,'. . . and as 'gross disregard of the rights of the person injured'. . . But the common denominator of these expressions is the test before mentioned, viz: that at the time of his act or omission to act the tort feasor be conscious, or chargeable with consciousness, of his wrongdoing.

Id. at 263-264. (Emphasis added by the court.)

Under that test, Mountain Bell would clearly not be guilty of gross negligence or willful misconduct in this case, since the record is clear that Mountain Bell believed its acts to be lawful and within the powers granted to it under the tariffs. The Public Service Commission confirmed that belief by its findings.

The Court in Pilot Industries further quoted from Holman v. Southwestern Bell Telephone Co., 358 F. Supp. 727 (D. Kan. 1973), which granted summary judgment for the telephone company on the basis of a tariff limitation of liability, holding as a matter of law that the following acts and omissions did not constitute willful or wanton conduct sufficient to come within the exception to the tariff limitation of liability:

> A. The plaintiffs' telephone number did not ring when persons dialed the plaintiffs' telephone number.
>
> B. Persons dialing the plaintiffs' telephone number received a busy signal when in fact none of the plaintiffs' telephones were in use.
>
> C. Persons calling the plaintiffs' telephone could hear the answering party faintly, however, the parties were not able to communicate.
>
> D. The plaintiffs' equipment did not work in conjunction with the main body of telephone equipment and did not function as normal telephone equipment functions.
>
> E. Other telephone calls were superimposed upon those of the plaintiffs.
>
> F. A mechanical intercept would erroneously advise persons calling plaintiffs' telephone numbers that the numbers were no longer in service.
>
> G. Defendant failed to properly maintain the equipment connecting plaintiffs' telephones with the central offices out of which plaintiffs' telephones were maintained, and defendant failed to maintain properly the telephone equipment installed by the defendant upon plaintiffs' premises. . . .
>
> H. Defendant failed to furnish a sufficient number of sufficiently-trained personnel to repair the equipment when it malfunctioned, both at plaintiffs' premises and in the central offices noted.

Id. at 730 (emphasis added).

In Wilkinson v. New England Telephone & Telegraph Co., 327 Mass. 132, 97 N.E.2d 413 (1951), also quoted in Pilot Industries, supra, the court reached a similar conclusion where plaintiff complained numerous times about faulty service over a period of about five months.

In Southwestern Bell Telephone Co. v. Rucker, 537 S.W.2d 326, 332-33 (Tex. Civ. App. 1976), a similar case, the court stated:

> While the record is replete with instances when the station could not broadcast because of problems with telephone company lines, or interference with lines between the station and transmitter, we find no evidence that the error in reconnecting the remote control lines at the transmitter resulted from an entire want of care which would raise the belief that the acts or omissions were the result of a conscious indifference to the rights or welfare of the persons to be affected by them. This has long been the requirement in a gross negligence case.

The court in Rucker refused to apply the exception to the tariff limitation of liability under the circumstances of that case.

Closer to home, in Olson v. Mountain States Telephone & Telegraph Co., 119 Ariz. 321, 580 P.2d 782 (1978), the plaintiff complained of loss of business from a failure to place an intercept, alleging a series of acts which plaintiff claimed fell within a "willful and deliberate" exception to the tariff limitation of liability. The evidence was that many customers had difficulty in reaching plaintiff and some did not reach her at all (similar to the allegations of the Atkin firm in the present case). Rejecting the argument that Mountain Bell's acts, taken together, constituted willful conduct, the court granted Mountain Bell summary judgment, stating:

> A plaintiff cannot establish intentional and deliberate conduct within the tariff's exception to the limitation on liability merely by showing a series of negligent acts.

Id. at 784.

Finally, in Warner v. Southwestern Bell Telephone Co., 428 S.W.2d 596 (Mo. App. 1968), the court held as a matter of law that the evidence was not sufficient to establish willful, wanton or reckless conduct under facts significantly more egregious than in the present case (see discussion, supra, pp. 11-12).

Considering the case law cited, together with the Public Service Commission finding that Mountain Bell's number change and intercept procedure was fair and reasonable, this Court should hold as a matter of law that Mountain Bell's conduct did not constitute gross negligence or willful misconduct. Hence, the tariff limitations of liability apply and the damage award must be reversed.

POINT III

THE DAMAGE VERDICT IS NOT SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE.

A. There was no substantial evidence of lost business.

Respondent did not plead special damage with specificity, as required by Rule 9(g), Utah Rules of Civil Procedure, nor was the issue of special damages submitted to the jury. The verdict specifically states that "general damages" were being awarded. (R. 336.) The question, therefore, is whether an award of general damage is supported by the evidence. Mountain Bell contends it is not because Respondent failed to produce any evidence of actual loss of business proximately caused by the alleged problems with telephone service.

The only evidence of lost business Respondent could point to in support of the verdict is that some clients had difficulty in telephoning Respondent. One witness, Richard Hunter, testified that a problem he wished to consult with a member of the firm about resolved itself before he could reach Mr. Miles (Tr. 292). Such evidence is clearly not substantial enough to support a verdict for $25,000.00. The fact is that there was absolutely no evidence that any client of Respondent took any legal business to another lawyer as a result of difficulties with the telephone service.

The testimony and exhibit introduced by John Miles on the issue of damages was highly speculative in that it dealt primarily with projected income, rather than with actual income. The evidence on actual income showed that the firm's annual income for 1980 increased over 1979 and the income for 1981 increased over 1980. Regardless of the income figures, however, there is a glaring lack of evidence of a causal connection between the operation of the intercepts and the supposed drop in projected income.

Plaintiff's evidence of damage thus falls short of the standard required by the law. In Wade v. Southwestern Bell Telephone Co., 352 S.W.2d 460 (Tex. Civ. App. 1961), the court held that plaintiff, an attorney, had not met his burden in proving loss of business "to a reasonable degree of certainty" in a directory omission case. The court described plaintiff's burden thusly:

> The burden was upon appellant to allege and prove the loss of profits and that such loss resulted from the alleged breach of contract by appellee and that such loss of profits must be established with a reasonable degree of certainty and cannot be left to speculation.

Id. at 462.

The court also set forth the following test for proving damages for loss of business:

> First, plaintiff must prove that he actually did lose some business as a result of the alleged breach of contract.
>
> Second, plaintiff must show that this loss of business resulted in a loss in his net profits for it is only loss of profits for which the law allows recovery.
>
> Third, plaintiff must establish this loss of net profits with a reasonable degree of certainty for recovery may not be had where proof of lost profits is uncertain or speculative, especially where the claim is based upon alleged breach of an advertising contract.

Id.

Accord Augustine v. Southern Bell Telephone & Telegraph Co., 91 So.2d 320 (Fla. 1956). In Wade, which presented a more plausible case for damages than the instant case (because plaintiff's listing was completely omitted), the court noted that, as in the present case, there was no proof of loss of any particular piece of business; hence, plaintiff's claim for loss was "wholly speculative" and the directed verdict was affirmed.

In Mitchell v. Southwestern Bell Telephone Co., 298 S.W.2d 520 (Mo. App. 1957), plaintiff sued the telephone company for loss of business allegedly arising out of an incorrect number listing. Plaintiff's witnesses testified, among other things, of a drastic reduction in the number of calls received during the period the directory with the erroneous number was in effect. Although the evidence was the best available, the court held that it was still speculative since, as in this case, the company earnings were greater than the year before and the claimed loss was reached by "estimate upon estimate, which left the whole matter in the realm of conjecture or speculation." Id. at 523.

In Monter v. Kratzers Specialty Bread Co., 29 Utah 2d 18, 504 P.2d 40 (1972), this court held that although the defendant lost a major customer because of plaintiff's wrongful eviction (the customer being unable to contact defendant), the judgment for substantial general damages consisting of projected lost profits was speculative and could not stand, stating that in such circumstances, only nominal damages could be awarded. Applying the rationale of Monter to the present case, this Court should hold a fortiori (because Respondent showed no loss of clients) that Respondent is entitled to judgment for nominal damages at most. Accord Page v. New England Telephone & Telegraph Co., 418 N.E.2d 1217 (Mass. 1981); Gould v. Mountain States Telephone & Telegraph Co., 6 Utah 2d 187, 309 P.2d 802, 803 (1957).

The other cases cited by Respondent on the issue of damages are distinguishable. In Southwestern Bell Telephone Co. v. Reeves, 578 S.W.2d 795 (Tex. Civ. App. 1979), the judgment for an attorney for lost business resulting from a failure to intercept calls was sustained upon proof that a major client of the attorney obtained legal services elsewhere and paid other lawyers substantial amounts because he could not contact the plaintiff. Cf. Gould v. Mountain States Telephone & Telegraph Co., supra; Mountain States Telephone & Telegraph Co. v. Hinchcliffe, 204 F.2d 381 (10th Cir. 1953). There is no such evidence in the present case.

In B & W Rustproofing, Inc. v. Michigan Bell Telephone Co., 88 Mich. App. 242, 276 N.W.2d 572 (1979), cited by Respondent, the question of sufficiency of evidence of damage was neither raised nor discussed.

In Sommerville v. Chesapeake & Potomac Telephone Co., 258 F. 147 (D.C. Cir. 1919), cited by Respondent, a judgment for $.11 was reversed, but the court never dealt with the question of the proper measure of damages for lost business, nor with the proper standard of proof thereof.

In summary, under the authority cited, the evidence in this case should be held to be too speculative to support an award of compensatory damage, where there is no evidence of actual loss of business, and the claimed loss of business is based on unsupported projections and estimates.

B. The failure to show loss of net income precludes recovery.

The law requires proof of net loss to support an award for loss of business; proof of gross loss only is insufficient. E.g. Garcia v. Mountain States Telephone & Telegraph Co., 315 F.2d 166 (10th Cir. 1963); Dowling Supply & Equipment, Inc. v. City of Anchorage, 490 P.2d 908 (Alaska 1971); Augustine v. Southern Bell Telephone & Telegraph Co., 91 So.2d 320 (Fla. 1956); Cagle v. Southern Bell Telephone & Telegraph Co., 143 Ga. App. 603, 239 S.E.2d 182 (1977); Joy Floral Co. v. South Central Bell Telephone Co., 563 S.W.2d 190 (Tenn. App. 1977); Wade v. Southwestern Bell Telephone Co., 352 S.W.2d 460 (Tex. Civ. App. 1961).

Respondent seeks to avoid the effect of this rule by claiming that its expenses were "fixed" and thus were unrelated to gross income. The fact is, however, that no such evidence appears in the record. Respondent's statements, therefore, are an attempt to remedy a fatal deficiency in the evidence, and this Court should not countenance such tactics.

Respondent erroneously cites Security Development Co. v. Fedco, Inc., 23 Utah 2d 306, 462 P.2d 700 (1969), for the proposition that evidence of a decline in gross receipts is sufficient to sustain a verdict. In that case (as shown by the quotation in Respondent's Brief), there was evidence that net profits were directly related to gross profits. No such evidence exists in the present case. If, as Respondent argues, its expenses were fixed, it would have been a simple matter to produce evidence of that fact; the failure to do so indicates that the "best evidence reasonably obtainable" was not presented. Cf. Mountain States Telephone & Telegraph Co. v. Hinchcliffe, 204 F.2d 381 (10th Cir. 1953). Hence, this Court should reverse the damage award.

Respondent's contention that Mountain Bell waived its right to require evidence of loss of net profits by stipulating that Respondent's income tax returns not be introduced into evidence is plainly wrong. A simple stipulation that Mountain Bell will not offer Respondent's tax returns falls far short of an agreement which alters the measure of damages and relieves Respondent of its burden of proof. If Respondent had offered the returns, it might have provided a basis for establishing the relationship between gross income and net income. But it was Respondent which sought their exclusion; therefore, Respondent cannot now be heard to complain of it.

In summary, the legal authority before the Court in this case establishes that to recover for loss of business a plaintiff must show an actual loss of business resulting in a loss of net profits and that such loss was proximately caused by the wrongful act of the defendant. In this case, Respondent has failed to show any of those elements; hence, the damage award must be reversed.

POINT IV

RESPONDENT IS NOT ENTITLED TO PUNITIVE DAMAGES.

Respondent does not seriously contend that Mountain Bell acted with malice; rather, it argues that mere "willfulness", in the sense of intentionally committing an act, is sufficient for punitive damages. That is not the law in Utah or in other jurisdictions, as the following will demonstrate.

Respondent predicates its punitive damage claim on Utah Code Ann. § 54-7-22. That reliance is misplaced. Applicable case law establishes that that statute does not create a general cause of action for service problems. A cause of action under that statute arises only where a public utility fails to perform a specific act required by statute or Commission order. If Mountain Bell had willfully failed to comply with the Public Service Commission order which required it to place a live intercept, a claim under Section 54-7-22 might have arisen. But Mountain Bell complied with the order. Hence, that section is inapplicable.

Furthermore, Respondent cannot assert a claim under Section 54-7-22 which would defeat the application of the tariff limitation of liability. In Waters v. Pacific Telephone, 12 Cal. 3d 1, 523 P.2d 1161, 114 Cal. Rptr. 753 (1974), the California Supreme Court squarely faced the same issue presented in this case. The plaintiff there sued to recover damages allegedly resulting from defendant's failure to provide adequate telephone service. Plaintiff contended that the action was permitted by Section 2106 of the California Public Utilities Code, which is virtually identical to Utah's Section 54-7-22. The court was faced with the potential conflict between Section 2106 and another provision of the Code, Section 1759, which divested lower courts of jurisdiction to "review, revise, correct or annul" any order of the Public Utilities Commission (Section 1759 is virtually identical to Utah's Section 54-7-16). Affirming the trial court's dismissal of the complaint on the basis of the tariff limitation of liability, the court stated:

> Since an award of substantial damages to plaintiff would be contrary to the policy adopted by the Commission and would interfere with the Commission's regulation of telephone utilities, we have concluded that Section 1759 bars the instant action.

523 P.2d at 1162.

See also Shoemaker v. Mountain States Telephone & Telegraph Co., 559 P.2d 721 (Colo. App. 1976); Burke v. Illinois Bell Telephone Co., 348 Ill. App. 529, 109 N.E. 2d 358 (1952); State ex rel. Mountain States Telephone & Telegraph Co. v. District Court, 503 P.2d 526 (Mont. 1972), Driscoll v. New York Telephone Co., 70 Misc. 2d 377, 334 N.Y.S.2d 97 (1972); Leighton v. New York Telephone Co., 61 N.Y.S. 2d 112 (1946).

Under the holding and rationale of Waters and the other cases cited, Respondent's claim for damage for inadequate service under Section 54-7-22 would be barred. Hence, Respondent cannot assert that statute as a basis for recovery of punitive damages, and Instruction 5-O, which essentially quoted Section 54-7-22, was given in error. (R. 327.)

Respondent's reliance on Utah Code Ann. §§ 54-3-1 and 54-3-8 as a basis for a cause of action for inadequate service is also misplaced. In Abraham v. New York Telephone Co., 380 N.Y.S. 2d 969 (1976), the plaintiff relied on a New York statute that is very similar to Utah's Section 54-3-1, arguing that it created an absolute statutory duty that any interruption of service constituted inadequate service as a matter of law, and that the company was strictly liable for all damages that resulted therefrom. The court rejected plaintiff's argument and applied the tariff limitation of liability. In analyzing the New York statute, the court considered the public policy ramifications of limiting the liability of the telephone company. The court stated:

> Section 91 does not stand in splendid isolation, but is part of a comprehensive regulatory scheme for public utilities. The requirement that 'instrumentalities and facilities' must be 'adequate', must be read as a statutory guide to the primary responsibility of the commission, which is the supervision and control of 'rates, rentals and charges' for service. . . . The rates for service, insofar as Section 91 may be germane, must be fixed so that the telephone company's instrumentalities and facilities shall be adequate 'to its business'. This is a far cry from the sweeping construction given this statute by plaintiff: That the facilities must be adequate (meaning without any interruption) 'to every subscriber'. The notion that Section 91 confers a private right of action has been rejected by courts in the past and the liability imposed by Section 93 [virtually identical to Utah's § 54-7-22] has been limited to violation of a direct order of prohibition or command by the Public Service Commission.

Id. at 971.

The court reasoned further that "to impose the kind of liability contended for by plaintiff" would have "a catastrophic impact on the rates to be charged the public at large for telephone service". Id. at 972. Accord Garrison v. Pacific Northwest Bell Telephone Co., 45 Ore. App. 523, 608 P.2d 1206 (1980).

Respondent's argument that intentional behavior suffices for punitive damages is wrong. Respondent relies on disjunctive language in Clayton v. Crossroads Equipment Co., No. 17013 (Utah, filed Sept. 17, 1982) ("willful or malicious"), yet the "established jurisprudence of this state" upon which the statement in Clayton was based indicates clearly that conduct must be both willful and malicious in order to support punitive damages. E.g., First Security Bank v. J.B.J. Feedyards, Inc., 653 P.2d 591 (Utah 1982); Elkington v. Foust, 618 P.2d 37 (Utah 1980); Terry v. Zions Cooperative Mercantile Institution, 605 P.2d 314 (Utah 1979); Kesler v. Rogers, 542 P.2d 354 (Utah 1975); Prince v. Peterson, 538 P.2d 1325 (Utah 1975); Palombi v. D & C Builders, 22 Utah 2d 297, 452 P.2d 325 (1969); Powers v. Taylor, 14 Utah 2d 152, 379 P.2d 380 (1963); Smoot v. Lund, 13 Utah 2d 168, 369 P.2d 933 (1962); Evans v. Gaisford, 122 Utah 156, 247 P.2d 431 (1952); Calhoun v. Universal Credit Co., 106 Utah 66, 146 P.2d 284 (1944). See also the following cases, decided subsequent to Clayton: Hal Taylor Associates v. Unionamerica, Inc., Case No. 17359 (Utah, filed Dec. 14, 1982); Leigh Furniture & Carpet Co. v. Isom, Case No. 17264 (Utah, filed Dec. 10, 1982).

As stated in Smoot v. Lund, supra:

> [Exemplary damages] may be awarded only where a willful and malicious injury has been perpetrated.

369 P.2d at 936 (emphasis added).

In addition, it should be noted that the term "willful" is subject to many interpretations, including "premeditated; malicious; done with evil intent or with a bad motive or purpose, or with indifference to the actual consequences; unlawful; without legal justification." Black's Law Dictionary 1774 (rev. 4th Ed. 1968). In the context of the present case, this court should be guided by the decisions of other courts that have interpreted similar phrases in similar contexts. See discussion, supra, pp. 14-19.

Even the cases cited by Respondent hold that punitive damages are not appropriate in such actions. In Southwestern Bell Telephone Co. v. Reeves, supra, cited by Respondent, the court reversed a $50,000.00 punitive damage award. In Sommerville v. Chesapeake & Potomac Telephone Co., supra, also cited by Respondent, the court held that where the telephone company acted in good faith in disconnecting plaintiff's telephone service for non-payment, punitive damages were not permitted even though the jury found that the disconnection was wrongful and without justification.

In denying a claim for punitive damages, the court in Warner v. Southwestern Bell Telephone Co., 428 S.W.2d 596 (Mo. App. 1968), observed:

> [W]e have not found that in any action against a telephone company for error or mistake, the court has held the conduct to be willful, malicious or reckless.

Id. at 603.

In the present case, Mountain Bell's actions in placing the mechanical intercept were taken under a good faith belief that it had the right to place an intercept on Respondent's line. In placing the live intercept, Mountain Bell was simply following the express order of the Public Service Commission. Under these circumstances, as a matter of law, Mountain Bell should not be subject to punitive damages.

POINT V

RESPONDENT IS NOT ENTITLED TO ATTORNEY'S FEES.

Respondent's claim for attorney's fees may be disposed of summarily for the following reasons:

1. Respondent has not cross-appealed the trial court's refusal to give jury instructions regarding attorney's fees, and has raised the issue for the first time in its Brief.

2. The Telalease provides for attorney's fees only to Mountain Bell upon the lessee's (Respondent's) default, not vice versa. (See Ex. 6, ¶ 23.)

3. Utah Code Ann. § 78-27-56, being an enactment of the 1981 legislature, was not in effect at the time this action was filed.

4. Respondent did not plead or prove a violation of 47 U.S.C. § 206.

CONCLUSION

Because of the numerous errors of law and insufficient evidence detailed in this Brief and in Appellant's first

Brief, this Court should reverse the judgment.

RESPECTFULLY SUBMITTED this 17th day of January, 1983.

THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY

By: Floyd A. Jensen

Floyd A. Jensen, Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 17th day of January, 1983, I caused to be mailed two (2) true and correct copies of the foregoing APPELLANT'S REPLY BRIEF by first-class mail, postage prepaid, to the following:

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